INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and rule of court involved	2
Statement	4
Summary of argument	5
Argument:	
I. The court below properly refused to consider those assignments of error not conforming to its rules. In any event, the admission of the evidence complained of was not error	6
II. Admission of Exhibit No. 75 was not error	13
III. The court below did not abuse its discretion in refusing to notice as plain error the admission in evidence of Exhibit 75	26
Conclusion	33
Appendix	34

CITATIONS

Cases:	
Benn v. *Forrest*, 213 Fed. 763	25
Berry v. *United States*, 15 F. (2d) 634	20
Brooks v. *United States*, 146 Fed. 223	22
Delaney v. *United States*, 263 U. S. 586	32
Fenno v. *Weston*, 31 Vt. 345	25
Girson v. *United States*, 88 F. (2d) 358	7
Goldstein v. *United States*, 73 F. (2d) 804	7
Gould v. *United States*, 209 Fed. 730	23
Harrison v. *United States*, 200 Fed. 662	20
Hart v. *United States*, 240 Fed. 911	20
Horning v. *District of Columbia*, 254 U. S. 135	32
Linn v. *United States*, 234 Fed. 543	22
Mitchell v. *United States*, 23 F. (2d) 260	13
Mullaney v. *United States*, 82 F. (2d) 638	7
National Acc. Society v. *Spiro*, 78 Fed. 774, certiorari denied, 168 U. S. 708	30
Osborne v. *United States*, 17 F. (2d) 246, certiorari denied, 274 U. S. 751	12
P. P. Mast & Co. v. *Superior Drill Co.*, 154 Fed. 45	29
Pandolfo v. *United States*, 286 Fed. 8, certiorari denied, 261 U. S. 621	13

36431—38——1

Cases—Continued. Page.

Ray v. *United States*, 301 U. S. 158 29
Reinecke v. *United States*, 278 Fed. 724 20
Rep. Iron and Steel Co. v. *Porter*, 228 Fed. 188 29
Rice v. *United States*, 35 F. (2d) 689; certiorari denied, 281 U. S. 730 23
Ridenour v. *United States*, 14 F. (2d) 888 13
Rumble v. *United States*, 143 Fed. 772 ..... 22, 23
Salinger v. *United States*, 272 U. S. 542 22
Samuels v. *United States*, 232 Fed. 536 22
Seaboard Air Line Ry. v. *Watson*, 287 U. S. 86 8
Shepard v. *United States*, 290 U. S. 96 20
St. Clair v. *United States*, 154 U. S. 134 24
State v. *Greene*, 38 Utah, 389 25
Sucesores de Perez Hermanos v. *Costa*, 281 Fed. 439 29
United States v. *Alcorn*, 80 F. (2d) 487 7
United States v. *Dexter*, 154 Fed. 890 22
United States v. *Marrin*, 159 Fed. 767, aff'd, 167 Fed. 951, certiorari denied, 223 U. S. 719 22
Weems v. *United States*, 217 U. S. 349 28
Whitehead v. *United States*, 245 Fed. 385 13
Williams v. *United States*, 265 Fed. 625 30

Statutes:

Judicial Code, Section 269 as amended (U. S. Code, Title 28, Section 391) 32
Act of June 19, 1934, c. 674, 48 Stat. 1178 ..... 9, 36

Rule of Court:

Rule XI of Rules of Circuit Court of Appeals for the Ninth Circuit 1, 2, 3, 5, 6, 7, 8, 26

Miscellaneous:

Longsdorf Cyclopedea of Federal Procedure, Vol. 5, Sec. 2279 24
Wigmore on Evidence (2d Ed.), Vol. 2:
Sec. 1071 25
Sec. 1073 25

In the Supreme Court of the United States

OCTOBER TERM, 1937.

No. 121

PIERCE LONERGAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 449–457) is reported in 88 F. (2d) 591.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1937 (R. 457). Rehearing was denied May 10, 1937 (R. 457). The petition for a writ of certiorari was filed June 8, 1937, and granted October 11, 1937 (R. 458). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the

Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED[1]

1. Whether the Circuit Court of Appeals erred in refusing to pass upon certain of the petitioner's assignments of error on the ground of nonconformity to its Rule XI.

2. Whether the admission in evidence of Exhibit No. 75, consisting of a letter written to the petitioner on behalf of an investor, was error.

3. Whether the Circuit Court of Appeals abused its discretion in refusing to notice as plain error the admission in evidence of Exhibit No. 75, notwithstanding the insufficiency of the petitioner's assignment of error relating thereto.

STATUTE AND RULE OF COURT INVOLVED

Criminal Code, Section 215 (U. S. C., Title 18, Section 338), as far as is material, reads as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the

[1] The petitioner has not made a statement of the questions involved. We have formulated these questions from the specification of errors contained in the brief in support of the petition for writ of certiorari (p. 11) and present and discuss them in the order we believe most logical.

purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post-office; * * * to be sent or delivered by the post-office establishment of the United States; * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Rule XI of the Circuit Court of Appeals for the Ninth Circuit provides:

> The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of errors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its

option, may notice a plain error not assigned.[2]

STATEMENT

The petitioner was found guilty by a jury in the District Court of the United States for the Western District of Washington upon seven counts of an indictment charging him and one John R. Walsh with using the mails in furtherance of a scheme to defraud, in violation of Section 215 of the Criminal Code (R. 19). The petitioner's co-defendant Walsh interposed a plea of *nolo contendere* (R. 29).

The petitioner was sentenced to three years on each of the counts upon which he was convicted, the terms of imprisonment to run concurrently (R. 20–21). The judgment of conviction was unanimously affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 449–457).

This case, as presented to this Court by the petition for writ of certiorari, involves primarily questions as to the admissibility of evidence. The nature of the evidence and the circumstances surrounding its admission are developed in the Argument, *infra,* and need not be stated here. The petitioner urges that much of the evidence admitted was not sufficiently connected with him. In order to show the connection of the petitioner with this

[2]As indicated in the petitioner's brief (Br. 40), this rule was amended subsequent to the filing of the petitioner's assignments of error in the District Court (R. 399), and consequently the amended rule is not applicable in this case.

evidence and to show his responsibility for certain statements and representations appearing in the evidence, a summary of the Government's evidence showing the background of the case—i. e., the organization, operation and business of the Seattle Metal Exchange and the participation in and influence upon the exchange of the petitioner—is set out as Appendix A, *infra,* p. 34.

SUMMARY OF ARGUMENT

1. Petitioner's assignments of error which were not considered by the court below clearly did not comply with Rule XI of that court as repeatedly and uniformly construed and applied by it and therefore did not merit consideration. In any event, the evidence the admission of which was complained of in these assignments of error was properly admitted.

2. Exhibit No. 75, when considered in connection with Exhibits Nos. 76–A and 76–B, was properly admitted in evidence, whether it be regarded as part of a course of dealings and correspondence between the parties, which, with the other evidence, tended to show the fraudulent intent of the petitioner and the existence of his scheme to defraud, or whether such exhibit be regarded as evidencing a tacit admission in the light of the equivocal replies thereto which failed to deny the statements contained therein.

3. The court below did not abuse its discretion in refusing to notice as plain error the admission in

evidence of Exhibit 75. Under its Rule XI the court below, at its option, may notice a plain error not properly assigned. This does not mean that the court is under a mandatory duty to notice an insufficiently assigned error, but only that in the exercise of a sound discretion it may notice an obvious error of a substantial character in order to prevent a miscarriage of justice. The error, if any, in the admission in evidence of Exhibit 75 was not of such a nature as to affect the petitioner's substantial rights.

ARGUMENT

I

THE COURT BELOW PROPERLY REFUSED TO CONSIDER THOSE ASSIGNMENTS OF ERROR NOT CONFORMING TO ITS RULES. IN ANY EVENT, THE ADMISSION OF THE EVIDENCE COMPLAINED OF WAS NOT ERROR

A. Petitioner contends that the Circuit Court of Appeals erred in refusing, on the ground of nonconformity to its Rule XI, to consider certain assignments of error, particularly Nos. IX to XVIII, XXI, XXXI and XXXII.

The pertinent portion of Rule XI reads as follows:

> When the error alleged is to the admission or the rejection of evidence the assignment of errors shall quote the full substance of the evidence admitted or rejected.

In *Goldstein* v. *United States*, 73 F. (2d) 804, at page 806, the court below, in construing and applying the portion of Rule XI here involved, said: "The assignment of error must not only quote 'the full substance of the evidence admitted or rejected,' but it must also state the error asserted and intended to be urged. This requires that the objection and ruling of the court upon the objection and the exception to the ruling be incorporated in the assignment of error."

Thus the court below, in unmistakable words, announced that thenceforth assignments of error not complying with its construction would not be considered.

Since its ruling in the *Goldstein* case the court below has uniformly and consistently followed this interpretation and has refused to consider assignments of error not conforming thereto. See *United States* v. *Alcorn*, 80 F. (2d) 487; *Mullaney* v. *United States*, 82 F. (2d) 638; *Girson* v. *United States*, 88 F. (2d) 358. The *Goldstein*, *Mullaney*, and *Girson* cases involved felonies.

It is fundamental that errors must be properly assigned in the record to present a question for review on appeal. Petitioner's assignments of error Nos. IX–XVIII (R. 400–417), XXI (R. 419), XXXI (R. 426) and XXXII (R. 426) clearly did not comply with the rule as interpreted in the *Goldstein* case. They did not incorporate "the objection

and ruling of the court upon the objection and the exception to the ruling.". Reasons are given in the assignments why the evidence should not have been admitted and why it should have been stricken, but it does not appear from the assignments what, if any, reasons were urged *at the trial* as the basis of the objections. The requirement that an assignment of error set forth the grounds of the objection and the ruling of the court thereon as well as the exception to the ruling is a salutary one, making for convenience and certainty in the consideration of cases by the Circuit Courts of Appeals.

Petitioner's assignments of error having failed to comply with Rule XI, he is in no position to complain of the refusal of the court below to consider them, for, as was said by this Court in *Seaboard Air Line Ry.* v. *Watson,* 287 U. S. 87, 91:

> It is essential to a proper presentation of points relied on for reversal that the statute and rules of court requiring and governing the forms of assignments of errors be complied with.

B. The petitioner attempts to show (Br. 46–53) that the errors thus assigned were of such a nature as to affect adversely his substantial rights, and, upon the assumption that his assignments of error were within the spirit and purpose of Rule XI, asserts that the judgment of the court below should therefore be reversed. It having been clearly shown that the petitioner's assignments of error did not comply with Rule XI as construed by the court

below, it is, of course, unnecessary to show that the evidence the admission of which was the basis of these assignments of error was properly admitted. Nevertheless, in order to dispel any possible doubt that might arise from a reading of the petitioner's brief as to the propriety of admitting the evidence complained of, we shall set forth the reasons why this evidence was properly admitted.

Exhibit No. 52 (R. 377–381), one of the indictment letters, is alleged by the petitioner to have been improperly admitted in evidence. This exhibit was a market letter which was sent out almost a month after the passage of the so-called Silver Purchase Act by Congress in June, 1934,[3] and which set forth in extravagant terms the alleged highly beneficial effect of that Act upon the silver market, and the splendid opportunity thereby afforded to investors in silver. This exhibit was identical with one of a group of market letters constituting Exhibit No. 3, which exhibit was admitted without objection (R. 50). One Coventry testified that these market letters were "mailed under the direction of Mr. Lonergan" (R. 50). He further testified that between October and December, 1933, he *compiled* market letters under the direction of the petitioner, but his testimony respecting their mailing was not, as assumed by the petitioner, limited to the period between October and December, 1933. Exhibit 52 having been mailed under the direction of the petitioner, it was not a third-party docu-

[3] Act of June 19, 1934, c. 674, 48 Stat. 1178.

ment, but rather an act by the petitioner in carrying out the scheme to defraud and hence was properly received in evidence.[4]

The petitioner also alleges as error (Br. 48) the admission in evidence of the testimony of several investors respecting representations and statements made to them by one Norman E. Coles, an associate broker, and by some of the salesmen. This testimony is alleged to be objectionable as hearsay on the ground that there was a lack of showing of any agency or any authorization by the petitioner for any of these statements.

The petitioner's authorization of and responsibility for the representations and statements of Coles and the salesman cannot be doubted in the light of the following evidence:

Lists of prospective customers were furnished to the salesman by the petitioner (R. 44). He conducted frequent meetings attended by the brokers, agents, and salesmen, at which he gave explanatory talks, instructions and directions and made representations and statements which were repeated by

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[4] The trial court gave the following instruction bearing upon this evidence (R. 352):

"INSTRUCTION NUMBER XXII

"Unless you are convinced by the evidence beyond a reasonable doubt that the defendant either personally directed or ratified or caused the mailing of the letters referred to in the various counts of this indictment, even though you should find the fraudulent scheme alleged in this indictment existed, such letters are not to be considered against the defendant Lonergan."

the salesmen and agents to the investors in reliance upon and pursuant to the directions of the petitioner (R. 43, 44, 46, 84, 163). Coles testified:

> The representations and statements I made to investors was under the authority of Mr. Lonergan [R. 86].
>
> I followed Mr. Lonergan's representation insofar as it related to silver, and the instructions he gave me with regard to silver contracts. In other words I repeated what he said to me and in those meetings [R. 89].

The petitioner likewise made representations and statements to the salesmen and agents individually and also to investors (R. 46, 85). The following customers of Coles testified to conversations with and representations made by the petitioner: Engle (R. 78, 85); Cooper (R. 98, 99); Spear (R. 121); Carroll (R. 124); Shattuck (R. 135); Bolling (R. 142); Romer (R. 150); Headley (R. 158); Enquist (R. 191). Before introducing the testimony of investors as to statements and representations of the agents and salesmen, counsel for the Government had amply shown the petitioner's authorization and responsibility for those representations.[5]

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[5] The trial court gave the following instructions upon this evidence (R. 352–353):

"INSTRUCTION NUMBER XXIII

"Conversations had between particular salesmen or brokers and purchasers, regardless of the nature of such conversations not had in the presence of the defendant, Pierce Loner-

The case of *Osborne* v. *United States,* 17 F. (2d) 246 (C. C. A. 9th), certiorari denied, 274 U. S. 751, presents a situation very similar to the facts at bar. The following language from that case (p. 249) supports the admissibility of this evidence in the instant case:

> A large number of the purchasers of lots or sections were permitted to testify, over objection, to representations and statements made to them by the salesmen through whom the purchases were made. This testimony was objected to on the ground that it was hearsay and that the statements were not authorized by the plaintiffs in error. If this

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gan, are not binding upon him, unless you find that defendant actually authorized the one making the particular misrepresentations, or ratified them afterwards. The authority to make representations to be binding upon the defendant must be based upon evidence beyond a reasonable doubt showing such authorization, or showing a ratification of the misrepresentation, and the authority cannot be based upon mere presumption or doubtful inference or guess work.

"INSTRUCTION NUMBER XXIV

"If you find from the evidence that isolated salesmen at various times may have made what, in your judgment, amount to misrepresentations were not made pursuant to the orders of defendant or pursuant to any general scheme to defraud devised by the defendant as charged, or in pursurance of any general plan or idea agreed upon devised by the defendant, but were mere isolated incidents made without actual authority of defendant and not ratified by the defendant, then, you must, even though you find said misrepresentations to have been made in isolated cases, find the defendant not guilty of having made such misrepresentations."

> testimony related to but a single transaction, there would be merit in the objection, but, when we consider the fact that the plaintiffs in error *maintained a school for the instruction of salesmen,* and issued bulletins and circulars for their guidance, and that the representations made by the different salesmen were in many instances similar in tone and were to some extent at least based upon the statements and information contained in these bulletins and circulars, we think the jury were warranted in finding that the statements and representations complained of were so made pursuant to a general plan or scheme adopted and sanctioned by the plaintiffs in error. [Italics added.]

See also *Whitehead* v. *United States,* 245 Fed. 385 (C. C. A. 5th); *Pandolfo* v. *United States,* 286 Fed. 8 (C. C. A. 7th), certiorari denied, 261 U. S. 621; *Ridenour* v. *United States,* 14 F. (2d) 888 (C. C. A. 3d); *Mitchell* v. *United States,* 23 F. (2d) 260 (C. C. A. 9th).

Thus, even if the petitioner's assignments of error did comply with Rule XI, which we urge was not the case, any argument of the petitioner as to the inadmissibility of this evidence is without weight. The evidence was properly admitted and was covered by fair instructions by the trial court.

II

ADMISSION OF EXHIBIT NO. 75 WAS NOT ERROR

Petitioner's entire contention that the court below erred in refusing to notice as "plain error" the

reception in evidence of Exhibit 75, described below, is premised on the assumption that Exhibit 75 was inadmissible for any purpose. We cannot accept this hypothesis. We submit that the admission of Exhibit 75, when considered in the light of the testimony that preceded it, the letters which were written in response to it, and the insufficient objections made to its reception, was not error.

Exhibit No. 75, Appendix, *infra*, p. 41, was a letter written to the petitioner by an attorney, Joseph E. Gandy, for and on behalf of his client, A. M. Atwood, an investor who had been investing in silver futures contracts through Louis Martin Company. A copy was sent to Louis Martin Company (R. 186). The letter set out the transactions Atwood had had with Louis Martin Company and the conferences Atwood had had with the petitioner and Walsh, demanded certain information as to the sale of Atwood's silver options, and advised the petitioner that Atwood was defrauded by the misrepresentations of the petitioner and of Walsh and that he would seek legal redress if necessary to recover the damages caused thereby.

Prior to the writing of the letter which constitutes Exhibit No. 75, the following transactions and correspondence between Lonergan and Atwood respecting Atwood's account had taken place (R. 183–184): After receiving a letter personally from the petitioner and frequent conversations with him in which Lonergan stated that he did not think

there was any question but that silver would go to a dollar an ounce, Atwood began to deal in silver futures contracts through Louis Martin Company. Upon the break in the silver market, Atwood received a telegram demanding payment of $400 more margin. Atwood deposited the $400 additional margin in escrow in the First National Bank of Seattle, which bank sent a letter to Louis Martin Company informing it of this deposit. Representations were made to Atwood by Lonergan that the drop in the price of silver was due to a syndicate of investors dumping 200,000 ounces of silver on the Seattle Exchange through P. A. Jordan and Company, and that there was a law suit for $150,000 pending against Louis Martin Company which might result in garnishment proceedings against the bank account of that firm. These representations at least as to the syndicate were false (R. 105, 106). Atwood asked the petitioner if the latter could "fix this thing up," and was told "to see Walsh." Apprised of this conversation, Walsh gave Atwood a release of the $400 deposited with the bank, plus $17.74, which represented all that Atwood got out of his investment. Thereupon the $400 deposit was returned to Atwood. It was at this stage of the transactions respecting Atwood's account that Exhibit 75 was written.

By reason of the statements and request for information contained in Exhibit 75, two letters were written in response thereto by J. R. Walsh, the

nominal head of Louis Martin Company. His name was signed to them by one M. L. H., who was undoubtedly Mary L. Herman, Walsh's stenographer (see R. 217). One of these letters, Exhibit 76–A, Appendix, *infra,* pp. 43–44, was addressed to Atwood's attorney, Gandy, informing him that certain silver options of Atwood, about which information had been requested, had been sold to P. A. Jordan and Company. The other letter, Exhibit 76–B, Appendix, *infra,* pp. 44–45, was addressed to Atwood, and after acknowledging Atwood's communication "making certain statements through your attorneys", offered to reinstate Atwood's account if the latter would deposit with Louis Martin Company the sum of $2,238.75.

Both Atwood and Gandy identified all three letters and testified as to the writing of Exhibit 75 and the receipt through the mails of Exhibit 76–A and Exhibit 76–B (R. 184–188).

It is the petitioner's theory, as disclosed by the cases cited by him and the tenor of his argument, that Exhibit 75 was not answered, acted upon, or brought to his knowledge, and hence that the admission of this exhibit, in no way connected with the petitioner, was prejudicial error. Moreover, the petitioner bases virtually his entire argument upon a misconception of the purpose for which the exhibit was received. The exhibit was not, as assumed by petitioner, received in evidence as proof of the petitioner's fraud or fraudulent representations.

It may be conceded that the admission in evidence of Exhibit 75, alone and unexplained, would be difficult to justify. It was in part a complaint in behalf of a customer of ill treatment at the hands of the petitioner and a demand for both information and redress. Had Lonergan ignored it, and had no reply been made to it, the letter would have no place in the evidence. But that is not the case. Exhibit 75 was admitted only after the answering letters, Exhibit 76–A and Exhibit 76–B, had been received, and as part of the whole transaction between the parties respecting Atwood's account (R. 189). That Exhibits 76–A and 76–B were in effect written in response to Exhibit 75 is apparent from the language of Exhibits 76–A and 76–B. Thus Exhibit 76–A, addressed to Gandy, states: "Following is the information requested by you." Exhibit 76–B, addressed to Atwood, refers to "making certain statements through your attorneys * * *." Furthermore, Gandy, the author of Exhibit 75, stated that it was "the only letter that I have ever written to either Mr. Lonergan or the Louis Martin Company" (R. 190).

It was the Government's theory, abundantly supported by the evidence, that Louis Martin Company was in truth and in fact Pierce Lonergan, and that the acts and conduct of Louis Martin Company, as well as letters written by J. R. Walsh for that company, were all acts done under the direct supervision and control of the petitioner, Loner-

gan. The evidence convincingly demonstrates that the Seattle Metal Exchange itself, its four brokerage firms, and their agents and salesmen, all acted pursuant to the directions of the petitioner. The origin of the exchange, the composition of its brokerage firms, and the entire history of the scheme render this conclusion irresistible. With particular reference to Louis Martin Company, the record shows that it was a corporation originally owned by Lonergan, but was transferred to J. R. Walsh. Lonergan was president of the exchange (R. 43). Lonergan employed one Coventry, who acted as manager for Louis Martin Company (R. 42).

Salesmen and agents of Louis Martin Company were employed either directly by Lonergan or by Lonergan in conjunction with Walsh (R. 83, 161, 169, 174). Lists of customers were furnished salesmen by Lonergan and meetings were held at which Lonergan instructed salesmen and gave "pep talks" (R. 44). Checks for payment of Louis Martin Company accounts were drawn by Lonergan as well as by Walsh (R. 64). Communications, including some charged in the various counts of the indictment, were sent out by Louis Martin Company under the direction of Lonergan (R. 50, 56). J. R. Walsh, the president of Louis Martin Company, told W. G. Coventry, the office manager, that his (Walsh's) position was under the control and direction of Lonergan, and that

every action he undertook he did under the direction of Lonergan, including the conduct of the affairs of Louis Martin Company (R. 61). Arthur Sternoff, a salesman for Louis Martin Company, was told by Lonergan it would be best to sever his connections with that company. Several days later Lonergan saw Sternoff typing a letter in the office of Louis Martin Company and said: "Didn't I tell you to get out of here?" In response to Sternoff's query, "Who are you to order me out of Louis Martin & Company's office", Lonergan replied: "I am President of the Exchange, I control everything around here, and what I say goes" (R. 165). Another witness testified to having overheard this conversation (R. 168).

In view of this testimony there can be no reasonable doubt that the acts and conduct of Louis Martin Company and J. R. Walsh were the acts and conduct of the petitioner Lonergan. We submit that after the reception of Exhibit 76–A and Exhibit 76–B, Exhibit 75, in reply to which they were written (R. 190), was properly admitted to explain their contents and to assist both court and jury in evaluating the entire correspondence as an integral part of the course of dealings between Atwood and the petitioner. For this reason the cases principally relied upon by the petitioner (Pet. 14–17) are clearly distinguishable. In every case cited by the petitioner where the admission of the letter or other document was held to be error, there

was a lack of evidence of defendant's notice or knowledge of the contents, or of defendant's connection therewith, or, in those cases involving the admission of a letter addressed to defendant, the letter was not answered or acted upon by defendant. Thus *Reinecke* v. *United States,* 278 Fed. 724 (C. C. A. 8th), is entirely distinguishable, as the bill of lading was never in the possession of or known about by the defendant. In *Harrison* v. *United States,* 200 Fed. 662 (C. C. A. 6th), the letter in question was written to defendant two years before the transactions forming the basis of the indictment, was remote in point of time, and, furthermore, was not shown to have been answered or acted upon by defendant. In *Berry* v. *United States,* 15 F. (2d) 634 (C. C. A. 5th), the petition for appointment of a receiver in bankruptcy, prepared by creditors of defendant, was not shown in any way to have been acted upon by or brought to the knowledge of defendant. In *Hart* v. *United States,* 240 Fed. 911 (C. C. A. 2d), the letter written to accused charging him with crimes and falsehoods was not answered by defendant. The case of *Shepard* v. *United States,* 290 U. S. 96, involved the admission of a purported dying declaration and is beside the point.

But in the case at bar not only was Exhibit 75 answered by the petitioner through Louis Martin Company, but Exhibit 76–A set forth an account of the actual sale of Atwood's silver future contracts,

whereas it appears there was no such actual sale but merely a paper sale to P. A. Jordan and Company, which was dominated by petitioner Lonergan. Atwood's contracts were probably some of the many customer's contracts eventually sold to William Piggot, a dummy account of Lonergan's (R. 211, 212). Moreover, Exhibit 76–B offered to reinstate Atwood's contract, which reinstatement, as admitted by Lonergan, would have been illegal (R. 326).

Both Exhibits 76–A and 76–B were studied attempts by the petitioner to satisfy a defrauded investor and to allay his suspicions. Exhibits 76–A and 76–B were introduced by the Government as instruments of Lonergan in furtherance of and to effectuate the scheme to defraud charged in the indictment. It should here be noted that Exhibits 76–A and 76–B were mailed before the mailing of the letters constituting the basis for Count 8 of the indictment, one of the counts on which the petitioner was convicted. From this as well as from abundant evidence to be found throughout the record, it is clear that Exhibits 76–A and 76–B were mailed while the fraudulent scheme was still in operation. The culmination of the scheme did not take place until the last of the silver held in escrow for the petitioner was sold and remittance made of the proceeds. The principal remittance was made on August 31, 1934 (R. 221).

In view of the convincing evidence of the petitioner's domination of all operations on the Seattle

Metal Exchange, we submit that Exhibit 75, when considered in conjunction with Exhibits 76–A and 76–B, was competent, material and relevant, not only with respect to the petitioner's general scheme, but with particular reference to his handling and disposition of the customer Atwood's account. (Cf. *Salinger* v. *United States,* 272 U. S. 542, 547, wherein a letter written to defendant but not answered was held admissible.)

In mail fraud cases the courts have consistently held that letters and other documents relating to transactions between the defendant and the person defrauded are admissible to show that the scheme charged in the indictment contemplated the use of the mails and as bearing on the intent with which the business was done and the existence of a scheme to defraud. *Rumble* v. *United States,* 143 Fed. 772 (C. C. A. 9th); *Brooks* v. *United States,* 146 Fed. 223 (C. C. A. 8th); *United States* v. *Dexter,* 154 Fed. 890 (N. D. Iowa); *United States* v. *Marrin,* 159 Fed. 767 (E. D. Pa.); affirmed, 167 Fed. 951 (C. C. A. 3d), certiorari denied, 223 U. S. 719; *Samuels* v. *United States,* 232 Fed. 536 (C. C. A. 8th); *Linn* v. *United States,* 234 Fed. 543 (C. C. A. 7th).

Frequently, as in the case at bar, the fraudulent scheme involving the use of the mails is extensive in scope and the precise delimitation of the evidence of its ramifications which may be properly received must rest largely in the discretion of the trial judge.

In *Gould* v. *United States,* 209 Fed. 730 (C. C. A. 8th), at page 739, the court said:

> In cases involving schemes to defraud the courts very properly allow a wide latitude in the admission of evidence for the prosecution, for it is only in this way that fraud can be established.

Thus in *Rice* v. *United States,* 35 F. (2d) 689 (C. C. A. 2d), certiorari denied, 281 U. S. 730, involving the use of the mails to defraud purchasers of stock in a mining corporation controlled by defendants, letters of resignation of certain directors of the corporation stating that defendants were engaged in a stock selling scheme rather than an honest attempt to develop the mine, which were answered in the form of articles boasting of the mine property, were held admissible. See also *Rumble* v. *United States,* 143 Fed. 772 (C. C. A. 9th), a mail fraud case, wherein a letter written to defendant, even though not answered by him, was held admissible where it was part of a large correspondence between the parties which tended to show the falsity of the representations charged in the indictment.

Since Exhibit 75 sought information from the petitioner respecting Atwood's account and Exhibits 76–A and 76–B by their language indicate they were written in response to this request, it is submitted that Exhibit 75 was competent evidence and admissible for the purpose of explaining the

replies thereto in order to give the jury a complete picture of the transactions between petitioner and Atwood. Cf. *St. Clair* v. *United States,* 154 U. S. 134, wherein this Court stated that acts, conduct and declarations attending a particular transaction may be so interwoven with each other that they cannot well be separated from each other without depriving the jury of proof that is essential in order to reach a just conclusion, in which case they are admissible as constituting part of the *res gestae.*

If there were parts of this letter which the petitioner regarded as incompetent, it was incumbent upon him to point out the improper portions by explicit objection. Though at the trial petitioner objected to the introduction of the exhibit as a whole on the ground it was hearsay, self-serving and the statements of a third party, at no time did he point out the accusatory statements which for the first time he complains of in his petition as invading the province of the jury, nor did he request that the objectionable parts be deleted or in any way kept from the jury. Objections to the admission of documentary evidence, admissible in part, must, of course, be specifically directed at the parts which are inadmissible. *Longsdorf Cyclopedea of Federal Procedure,* Vol. 5, Section 2279.

We believe it has been shown that Exhibit 75 was competent to explain Exhibits 76–A and 76–B and

admissible as part of a larger correspondence, and the trial court was not requested to delete or exclude any part thereof which petitioner considered objectionable. Therefore, it is unnecessary to discuss at length the question whether the accusatory statements in this exhibit, together with the petitioner's replies thereto, were competent as tacit admissions of the truth of the statements. The petitioner's mere silence or his failure to answer a written charge of fraudulent dealing would not ordinarily render such writing admissible, yet when such written charge is answered by or on behalf of the defendant, the studied evasion of a reply, the further falsification of material facts (Ex. 76–A), a noncommital offer of compromise, known by the petitioner to be impossible of fulfillment (Ex. 76–B), might well justify a prudent judge in submitting the entire correspondence to the jury over objections much more specific and pointed than in the case at bar (R. 189). Courts have taken cognizance of this rule of evidence based on human conduct in determining the admissibility of documents and have sanctioned the admission of statements or letters accusatory of a defendant which defendant either failed to deny or only partly denied. See *Benn* v. *Forrest,* 213 Fed. 763 (C. C. A. 1st); *State* v. *Greene,* 38 Utah 389; *Fenno* v. *Weston,* 31 Vt. 345, 351; Wigmore on Evidence (2d Ed.), Vol. 2, Sections 1071, 1073.

III

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN REFUSING TO NOTICE AS PLAIN ERROR THE ADMISSION IN EVIDENCE OF EXHIBIT 75

The pertinent portion of Rule XI of the court below, which the petitioner invokes, reads as follows:

> * * * and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

The petitioner contends that the admission in evidence of Exhibit 75 was error so plain that the court below was required to notice it, even if the petitioner's assignment of error relating thereto was insufficient. This contention must fail for two reasons: (1) The court below was not, as the petitioner erroneously assumes, under a mandatory duty to notice error not properly assigned, but rather its action was a matter of judicial discretion. (2) The error, if any, in the admission of Exhibit 75 was not "plain error" of such a substantial nature as to render the refusal of the court below to notice it an abuse of discretion.

1. The petitioner (Pet. 19) mentions the compulsion upon an appellate court to notice error, even though not saved and assigned in accordance with existing rules of the court. A Circuit Court of Appeals in determining whether an unassigned error is plain error within the meaning of the rule does so in the exercise of a sound discretion in or-

der to prevent a miscarriage of justice. The assumption that it must notice the error is refuted by the very language of the rule itself: "but the court, at its option, may notice a plain error not assigned." Acceptance of the petitioner's theory would require the court below, even in the absence of objections or assignments of error, to read the entire record and review every exercise of discretion by the trial court in the admission or rejection of evidence.

We are not here concerned with questions of fundamental error such as want of jurisdiction or failure of the indictment to charge an offense or obvious deprivation of constitutional rights which the appellate court should and does review irrespective of the appellant's failure or neglect properly to raise such questions. Here the petitioner asserts merely that in a prolonged trial involving many extremely complex and technical transactions, the judgment must be reversed and the case retried because of a single and relatively unimportant lapse of the trial judge in the reception of evidence, however delinquent the petitioner may have been in saving the error for review. The admission or rejection of evidence during the course of a trial rests largely within the discretion of the trial judge, who frequently is faced with questions of legal admissibility which must be decided without extended consideration or argument. Such being the case, appellate courts in reviewing

this exercise of discretion are naturally and justifiably reluctant to overrule the trial court. For this reason the appellate court is vested with discretionary power under the rule in question to decide whether or not the alleged error of the trial court is so plain that it deserves to be noticed on review, even though not assigned.

In *Weems* v. *United States,* 217 U. S. 349, at page 362, this Court, in construing an almost identical provision in its rules, said: "It confers a discretion that may be exercised at any time * * *." The cases cited by the petitioner (Pet. 19), which could be supplemented by numerous others involving the application of the rule in question, go no farther than to hold what is undisputed—that the court will, in the exercise of the discretion vested in it, notice error of a substantial and vital character seriously affecting a party's rights, notwithstanding the absence of proper preservation of the error, and that the absence of such proper preservation of the error will not preclude the court from exercising its option.

2. We submit that the error, if any, in the admission in evidence of Exhibit 75, was not so apparent upon the face of the record and of such controlling nature that the refusal of the court below to notice it notwithstanding the absence of proper assignments of error was an arbitrary and unreasonable abuse of its discretion.

In the case at bar the court below, in the sound exercise of its discretion, did not consider the ad-

mission in evidence of Exhibit 75 error of such a controlling nature as to warrant its notice as plain error under Rule XI. Having exercised its discretion in the matter, its action will not be reviewed by this Court unless there was a clear abuse of discretion. What this Court said in *Ray* v. *United States,* 301 U. S. 158, 166, with reference to the supervision by the Circuit Court of Appeals over proceedings for appeal, seems equally appropriate to the point here involved:

> The supervision and control of the Circuit Court of Appeals under the Criminal Appeals Rules calls for the exercise of a sound judicial discretion, and its action will not be reviewed unless it appears that its discretion has been abused.

Various courts in numerous instances have had occasion to relax the strict enforcement of rules and notice error not assigned, but have not attempted to define generally what constitutes "plain error" within the meaning of the rule, since each case of necessity depends upon its particular facts and circumstances. The practice of noticing error as plain error is one that ought not to be extended since its purpose is not that the court shall sift the record but only that it may notice errors which are obvious and vital, the underlying principle being to prevent a miscarriage of justice. *P. P. Mast & Co.* v. *Superior Drill Co.,* 154 Fed. 45 (C. C. A. 6th); *Rep. Iron and Steel Co.* v. *Porter,* 228 Fed. 188 (C. C. A. 6th); *Sucesores de Perez Hermanos*

v. *Costa,* 281 Fed. 439 (C. C. A. 1st). Even the fact that the error, if it had been properly assigned, would constrain the court to reverse the judgment is not of itself sufficient to impel the court "under the discretion reserved in the rule" to notice the error. *National Acc. Society* v. *Spiro,* 78 Fed. 774, 779 (C. C. A. 6th), certiorari denied, 168 U. S. 708. Whether the accused is prejudiced by the erroneous admission of evidence at a trial should not be considered abstractly. The question is rather one of practical effect when the trial as a whole and all the circumstances of the case are regarded. *Williams* v. *United States,* 265 Fed. 625 (C. C. A. 8th).

The court below should not be deemed to have erred in the case at bar for insisting upon the orderly observance of its rules unless in fact the trial court committed error so plainly prejudicial that the petitioner was deprived of substantial justice. We have shown that Exhibit 75 was admissible in evidence as tending to explain Exhibits 76–A and 76–B, which in themselves were letters which the petitioner caused to be mailed in furtherance of the scheme to defraud while such scheme was in progress. Furthermore Exhibit 75 was introduced and received as part of a larger correspondence and course of dealings between the petitioner and Atwood respecting the latter's account. At the trial the petitioner made no specific objection to or motion to strike from this exhibit the accusatory statements of which he now vigorously complains.

There was an abundance of evidence to justify the jury in finding that the petitioner devised a scheme to defraud investors, and that he mailed or caused to be mailed the letters set forth in the indictment in furtherance of this scheme. The evidence justifies the conclusion that the following representations were fraudulently made by the petitioner: that the break in the Seattle Market was caused by a California syndicate dumping 200,000 ounces of silver on that market through P. A. Jordan and Company (R. 51, 86, 105; see R. 184); that if a raid was made on the Seattle market the other world exchanges, such as New York and Shanghai, would come to the aid of the Seattle Market, thus preventing any break in the Seattle market (R. 45, 78, 84, 162); and that the moneys paid in as margins by both buyers and sellers were held in a clearing house as a trust fund for the protection of investors (R. 48, 74, 86, 124). There being convincing and compelling evidence that the petitioner repeatedly made fraudulent representations, we submit that the reception of Exhibit 75 as part of a larger correspondence, did not, because of the writer's expression of opinion, constitute error so flagrant as to suggest a miscarriage of justice. This becomes even more apparent when Exhibit 75 is read as a whole in connection with the testimony that preceded it. In this light the exhibit was relevant and material on the question of the petitioner's fraudulent intent. Error, if any, in the

admission of this exhibit was not so substantial or so clearly prejudicial as to warrant reversal of the judgment. See Judicial Code, Section 269, as amended (U. S. Code, Title 28, Section 391). Cf. *Horning* v. *District of Columbia*, 254 U. S. 135.

The petitioner devotes twenty-five pages of his brief (Br. 8–34) to an extended argument in support of a contention that the Government did not establish the indictment as laid. Having failed to raise this point in his petition for a writ of certiorari he is, of course, precluded from arguing the question before this Court. In any event, both the trial court and the court below were of the opinion that the scheme described in the indictment was proved substantially as alleged and that there was substantial evidence that the petitioner devised the scheme and mailed or caused to be mailed in its execution the letters set forth in the indictment (R. 454). The correctness of the concurrent action of the two lower courts is shown by the evidence, some of which we have referred to in the Argument and some of which is set out in Appendix A, *infra*. As said by this Court in *Delaney* v. *United States*, 263 U. S. 586, 589–590:

> Petitioner attacks the judgment as not being supported by the testimony, a great deal of which is detailed. The immediate reply is that the probative sufficiency of the testimony has the support of the District

> Court (in which is included the verdict of the jury) and of the Circuit Court of Appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents.

This language is equally applicable to the instant case.

CONCLUSION

We therefore respectfully submit that the judgment of the Circuit Court of Appeals for the Ninth Circuit should be affirmed.

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JANUARY 1938.

APPENDIX A

SUMMARY OF GOVERNMENT'S EVIDENCE

The Seattle Metal Exchange, also known as the Seattle Silver Market, was incorporated in 1931 by the petitioner Pierce Lonergan and his wife at a capitalization of $1,000 (R. 327). It existed in name only until June, 1933, at which time it was used in dealing in contracts for future delivery of silver (R. 328). At about this time there came into existence four brokerage firms: Pierce Lonergan and Company, P. A. Jordan and Company, Louis Martin Company and Gill and Company.

Pierce Lonergan and Company was a trade name for Pierce Lonergan (R. 302). P. A. Jordan and Company was an assumed name used by George Goggin, a brother-in-law of Lonergan, and was formed at the suggestion of Lonergan (R. 101). Louis Martin Company was incorporated by Pierce Lonergan in 1932, and transferred to John R. Walsh (R. 285, 328). Gill and Company was represented by Louis Gill, who from June, 1932, until June, 1933, was employed by Lonergan (R. 195) and prior thereto had been in the wholesale drug business (R. 328).

Lonergan was the head of the Seattle Metal Exchange (R. 43, 49, 95). Lonergan, Goggin, Walsh and Gill were the only broker members of the Exchange and the only persons allowed to participate in the trading and to make bids or offers (R. 43, 101).

He employed one Coventry, who acted as manager for Louis Martin Company (R. 42). He interested Norman Coles in associating with Louis Martin Company (R. 83). Sternoff and Lindman who were identified with Louis Martin Company were also employed by Lonergan (R. 162, 169). Lonergan and Walsh made arrangements with Ray Thompson and Arthur Pritchard of Tacoma to act as associate brokers (R. 174). It was the business of the salesmen to contact the public and interest people in the purchase of silver futures. For this purpose Lonergan furnished lists of prospective customers (R. 44).

Lonergan addressed various service clubs and civic organizations of Seattle and neighboring cities on silver (R. 82). Frequent meetings were held under the direction of Lonergan which were attended by the salesmen of all four brokerage firms as well as by the brokers, at which meetings Lonergan gave lectures and explanatory talks in reference to the silver market (R. 43, 44, 84). At these meetings, as well as to individual salesmen and investors, Lonergan made the following statements and representations:

1. That the purchase of silver futures contracts on a margin was the safest investment possible as silver must inevitably rise in price and there was every chance to win and no chance to lose (R. 46, 78, 83–85, 86, 100, 121, 124, 142).

2. That if any raid was made on the Seattle Metal Exchange the exchanges in New York, London, and Shanghai would come to the aid of the Seattle Exchange, thus preventing any break in the market (R. 45, 78, 84, 124, 162).

3. That all moneys paid in as margins by the buyers together with an equal amount put up by the seller were held by the exchange in escrow in a clearing house as a trust fund for the protection of the investors (R. 48, 74, 86, 124, 163).

These representations and statements were repeated by the salesmen to prospective customers and investors pursuant to the instructions of and in reliance on the statements of Lonergan (R. 44, 86, 163, 170).

There was in fact no connection between the Seattle Exchange and the exchanges of New York, Shanghai, and other world exchanges (R. 203), nor did any of these other exchanges come to the aid of the Seattle Exchange when the break in the latter exchange did occur (R. 46). All the moneys paid in as margins by the investors was not placed in escrow in the clearing house as a trust fund, as there was no trust fund (R. 196).

Weekly market letters were prepared either by or under the direction of Lonergan in which the future of silver as a commodity and the opportunity for investments in silver over the exchange were set forth in optimistic terms (R. 50). One market letter was sent out almost a month after the enactment of the so-called Silver Purchase Act by Congress in June, 1934 [1] (Exhibit No. 52; R. 377). These market letters were mailed under the direction of Lonergan to customers and prospective customers (R. 50).

Beginning approximately in June, 1933, the Seattle Metal Exchange dealt almost exclusively in silver futures contracts on margin and virtually

[1] Act of June 19, 1934, c. 674, 48 Stat. 1178.

every investor purchased silver for future delivery on margin (R. 48, 49). Whereas the New York Exchange dealt in units of not less than 25,000 ounces of silver, the Seattle Metal Exchange dealt in silver futures contracts with units as small as 500 ounces (R. 48, 103). Originally the margin requirement was ten cents an ounce or $50 for 500 ounces of silver, but this was later changed to twelve cents an ounce. In June, 1934, after Congress enacted the so-called Silver Purchase Act to stabilize silver and imposed a 50% tax upon the profit from dealing in silver, the margins were reduced from $60 for 500 ounces to $30 for 500 ounces, corresponding to a reduction of from 12 to 6 cents an ounce (R. 47, 84, 85).

During the approximate year in which the Seattle Metal Exchange dealt in silver futures contracts, 6,339 contracts were sold over the exchange and 5,073 contracts were bought over the exchange in the names of O'Connell, LaPlante, Shephard, Schmidt, Ginsberg, Goggin, Dineen, Casey, and Whalen (R. 212). These names and orders were placed through the exchange by Lonergan and his associates. None of these persons actually engaged in the buying or selling of silver futures contracts and some of them never authorized the use of their names (R. 102, 103, 105, 200, 204, 205). 1983 contracts represented transactions in which the above names were on both sides of the market while in only four contracts were *customers* on both sides of the market (R. 212).

In December, 1933, the Seattle First National Bank, at the request of Lonergan, purchased silver bullion with money borrowed by Lonergan from the Eddy Investment Company. This silver was held

in escrow by the bank as collateral for the repayment of this loan pursuant to an agreement between Lonergan and the Eddy Investment Company. On July 25, 1934, the greater portion of this silver was sold in New York at Lonergan's direction. The price received was 46¼¢ per ounce (R. 219, 220).

On July 27, 1934, Goggin of P. A. Jordan and Company, at the request of Lonergan, offered on the Seattle Metal Exchange fifty contracts for sale at approximately 3¢ below the market (R. 106, 197). The rules of the Seattle Metal Exchange limited the drop to 3¢ below the previous day's low (R. 55). There were no takers. This drop of 3¢ in the Seattle quotations was the first break in the silver futures market which finally resulted in wiping out the investments of all customers. This drop of 3¢, when there had been no appreciable change on the New York or other markets, caused consternation among the salesmen. The various salesmen and agents met and passed a resolution urging that the Exchange be closed for three days to enable them to find purchasers for the contracts being offered for sale (R. 54, 164). Lonergan refused to close the exchange and both he and Walsh told various salesmen, associate brokers, and investors that the drop in the Seattle Exchange was caused by a California syndicate dumping 200,000 ounces of silver on the Seattle market for sale through P. A. Jordan and Company at the best price obtainable (R. 51, 86, 163). No California syndicate or anyone else offered 200,000 ounces of silver for sale through P. A. Jordan and Company, nor did any California syndicate at any time prior to July 27th, purchase any silver through P. A. Jordan and Company (R. 105, 106).

The only silver offered for sale at this time was the offer by Goggin of 50 contracts at the request of Lonergan. On July 28, Lonergan stated to Mrs. Coventry: "I am going to break the market wide open and by the end of the week there will be nothing left," and further stated he could have told months ago when this was going to happen and just what was going to happen (R. 223).

The next trading day, July 30, more contracts were offered for sale, again at 3¢ below the closing price of the prior trading day (R. 55, 106). Again there were no bids and no purchases (R. 106) and again the market dropped 3¢. On July 31, the market dropped again (R. 55, 87). Thus during the three trading days of July 27, 30, and 31, there was a drop of approximately 9¢ (R. 87, 198). While the price on the Seattle market was thus dropping, that of the New York market rose (R. 55, 202). Prior to this break in the market the average price of the Seattle market for more than a year was two to three cents higher than the New York market (R. 62, 177).

When the first drop in the price on the Seattle Metal Exchange occurred the accounts of many of the customers were wiped out. Letters and telegrams were sent to the customers demanding the deposit of additional margin (R. 55, 87, 95). Some of these letters were compiled and sent out by direction of Lonergan (R. 87).

Many of the customers deposited in escrow the additional margin demanded, to be paid when the silver was delivered to them. In each case their original margin was lost and their escrow money returned (R. 144, 184, 198).

On July 25, 1934, two days before the first break in the market, there were 1,245 purchase contracts of customers on the records of the four brokerage firms representing 622,500 ounces of silver. Between July 31 and August 21, 1,082 of these contracts were sold to one William Piggott (R. 211, 212) which was a dummy account of Lonergan's (R. 206). The remaining 123 contracts were cancelled (R. 212). On August 9, 1934, by Presidential Proclamation (49 Stat. 3402), silver was nationalized. Late the same month, the silver remaining in escrow in the Seattle First National Bank was sold to the Government at 50¢ an ounce, the principal remittance being made to the bank on August 31, 1934 (R. 221).

The evidence showing mailing and receipt of the indictment letters will be found on the following pages of the record: Count 1.—(R. 82, 137, 138); Count 2.—(R. 181); Count 3.—(R. 50, 138); Count 4.—(R. 88); Count 5.—(R. 87); Count 6.—(R. 56, 58, 206), Count 8.—(R. 95, 96).

APPENDIX B

Exhibit No. 75 reads as follows (R. 384):

AUGUST 17, 1934.

Mr. PIERCE LONERGAN,
211 American Bank Building,
Seattle, Washington.

DEAR SIR: We are attorneys for Mr. A. M. Atwood who for approximately the last year and a half had been buying and selling silver on the Seattle Metal Exchange, through Louis Martin Company, silver brokers.

During the middle of July last, Mr. Atwood had on hand silver futures, as follows: 1,000 ounces September, 2,000 ounces September, 2,000 ounces March, 1935, with a total credit margin of $324.93 in cash.

By reason of an alleged dumping of several hundred thousand ounces of silver on the Seattle market at approximately that time, the market was driven down each day to the maximum permitted under the law, with the result that on July 28th, Louis Martin Co. advised Mr. Atwood that an extra margin requirement was necessary to maintain his silver options, and that it must be put up not later than Monday, July 30th, and failing to do so, would necessitate the selling of his silver options at the market.

After conferences with Mr. Pierce Lonergan and Mr. J. P. Walsh, Mr. Atwood deposited $400.00 in the Trust Department of

the First National Bank, as an extra margin, conditioned upon the performance of your contract and by the delivery by you of 3,000 ounces of September option silver bullion .999 fine and 2,000 ounces of March option silver bullion .999 fine.

Mr. Atwood thus had covered the required margins. On Monday, August 6th, Mr. Atwood had a conference with Mr. Pierce Lonergan, wherein Mr. Lonergan informed Mr. Atwood that the Seattle Metal Exchange was broke; that Louis Martin Co. was broke and that there was an impending law suit involving about $150,000, which suit would tie up all the funds in Louis Martin Co., and the Seattle Metal Exchange, and that Mr. Atwood had better hurry and get his $400 deposit back before these litigants tied it up and attached it, Mr. Lonergan at that time informing Mr. Atwood that the attorneys for such litigants were in conference and that the suit would be started immediately. Accordingly, Mr. Atwood attempted to reach Mr. Walsh in order to secure a release of his deposit at the First National Bank and was unable to do so on that day.

On August 9th, however, Mr. Atwood reached Mr. Walsh, who made arrangements for Mr. Atwood to take back his $400.00 deposit in the First National Bank. Mr. Atwood took Mr. Walsh's letter authorizing the withdrawal of the $400 deposit and obtained such deposit.

Within an hour after Mr. Atwood had withdrawn his deposit and sold his silver options at Mr. Lonergan's and Mr. Walsh's pleadings, the President proclaimed the nationalization of silver, at 50.01.

The allegations and persuasions made by Mr. Pierce Lonergan and Mr. J. P. Walsh to Mr. Atwood were obviously fraudulently made and were made solely with the intent to get Mr. Atwood out of the market in order to buy his silver at a low price in order that the same might be sold upon the nationalization of silver, which latter event Mr. Pierce Lonergan had been expecting for some time.

Reference is here made to Rem. Rev. Stat. of the State of Washington, No. 2477, and as attorneys for Mr. A. M. Atwood, and pursuant to said statute, we herewith demand that the Seattle Metal Exchange and Louis Martin Co., or either, or both, furnish Mr. Atwood a written statement containing the names of the persons to whom his silver options were sold, the time when, the place where, the amount of, and the price at which the same was sold. You may comply with this demand by furnishing the same within 48 hours to the writer, at this office.

You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan and Mr. J. P. Walsh and that he will seek legal redress, if necessary, to recover his damages sustained by him by reason of such fraudulent misrepresentations.

Yours very truly,

BATTLE, HULBERT, HELSELL & BETTENS,
By JOSEPH E. GANDY.
JEG: AC.

Exhibit No. 76–A reads as follows (R. 386):

Eliot 3055.
Cable address "Lomar", Seattle.

LOUIS MARTIN COMPANY,
Bullion Brokers,
American Bank Building,
SEATTLE, WASHINGTON *August 20, 1934.*

BATTLE, HULBERT & HELSELL,
10th Floor Exchange Building,
Seattle, Washington.

Attention Mr. Joseph E. Gandy

GENTLEMEN: Following is the information requested by you regarding the transactions for the account of Mr. A. M. Atwood on August 9, 1934.

Option	Price	Amount	Sold to—
6 Sept	44¢	$1,320.00	Jordan Co.
4 March	44¢	880.00	Jordan Co.

These transactions took place at Seattle, Washington. Any further information you may wish, please advise us.

Yours truly,
LOUIS MARTIN CO.

JRW: MLH. J. R. WALSH—(M. L. H.)

Exhibit No. 76–B reads as follows (R. 387):

Eliot 3055. Cable address "Lomar", Seattle
LOUIS MARTIN COMPANY,
Bullion Brokers,
American Bank Building,
SEATTLE, WASHINGTON *August 21, 1934.*

Mr. A. M. ATWOOD,
c/o John Davis Co.,
Seattle, Washington.

DEAR SIR: Your communication of the 19th day of August, making certain statements through your attorneys regarding the manner in which your Silver contract account with Louis Martin Co. had been handled, has been received.

This is to advise you that upon your depositing with us the sum of two thousand two hundred and thirty-eight dollars & seventy-five cents ($2,238.75), representing ninety per cent (90%) of the contract price of the Silver contracted by you your account will be reinstated for the amount of Silver and at the price contracted by you, provided, however, that you comply with the terms, conditions and provisions upon which you originally contracted the Silver and particularly the terms of your contract as evidenced by your signature card.

The deposit of $2,238.75 with us must be made by you on or before noon, Thursday, August 23, 1934.

Sincerely yours,

LOUIS MARTIN CO.,

By J. R. WALSH—(M. L. H.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No 121.—October Term, 1937.

Pierce Lonergan, Petitioner, *vs.* The United States of America.	Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 31, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

In the District Court, Western District of Washington, the petitioner was convicted of violating Sec. 215 Criminal Code (18 U. S. C. A. 338), by using the mails for fraudulent purposes. He appealed to the Circuit Court of Appeals, Ninth Circuit, and filed —August 14, 1936—forty assignments of error. The judgment of conviction was affirmed March 6, 1937, upon an opinion which, among other things, states—

"Twenty-eight assignments (numbered 5, 9 to 25, inclusive, and 31 to 40, inclusive) are to the admission of and refusal to strike out evidence. The assignments do not indicate that any of this evidence was objected to in the trial court. They do not state what objections, if any, were made, nor the grounds thereof, nor the grounds, if any, on which appellant moved to strike out the evidence. Such assignments do not conform to our Rule 11 and will not be considered. Cody *v.* United States (C. C. A. 9), 73 F. (2d) 180, 184; Goldstein *v.* United States (C. C. A. 9), 73 F. (2d) 804, 806."

This ruling we think was error. Through wrongful interpretation and application of the rule petitioner was denied a proper hearing.

At the date of the appeal the pertinent portion of Rule 11 read as follows—"When the error alleged is to the admission or the rejection of evidence the assignment of errors shall quote the full substance of the evidence admitted or rejected."

Concerning this provision, the opinion in *Goldstein* v. *United States,* (1934) 73 F. (2d) 804, 806, declared—"The assignment of error must not only quote 'the full substance of the evidence admitted or rejected,' but it must also state the error asserted and

intended to be urged. This requires that the objection and ruling of the court upon the objection and the exception to the ruling be incorporated in the assignment of error." Adhering to this interpretation, the court persistently refused to consider assignments deemed not in conformity therewith.

Between the appeal and announcement of the opinion under consideration, Rule 11 was amended so as to provide—"When the error alleged is to the admission or rejection of evidence the assignment of error shall quote *the ground urged at the trial for the objection and the exception taken and* the full substance of the evidence admitted or rejected."

Manifestly petitioner had the right to rely upon the rule, properly construed, as it stood at the time of his appeal—before the amendment. And if analysis of one of the rejected assignments discloses substantial compliance, the cause must go back for further consideration of the record.

Litigants may not be deprived of a hearing upon their points by wrongful construction of rules nor by their arbitrary application. An unwarranted construction has been given to the language of Rule 11; properly interpreted, it did not require petitioner to do all the things specified by the amendment.

The substance of Assignment No. XVI follows—

"The court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 75, being a letter on the letterhead of Battle, Hulbert, Helsell & Bettens, as follows:" [This letter—a long one—dated August 17, 1934, addressed to petitioner and signed Battle, Hulbert, Helsell & Bettens, by Joseph E. Gandy, is set out in full. It states, among other things, that certain "allegations and persuasions" made by the petitioner to one Atwood "were obviously fraudulently made" and that one "Atwood was defrauded by the misrepresentations", etc.]

"The testimony in support of its admission given by witnesses A. M. Atwood and Joseph Gandy, is substantially as follows." [Here follows a resume of the testimony given by these witnesses.]

"The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

"1. It was hearsay evidence, contained conclusions of third parties, and happened subsequent to the termination of the alleged plan.

"2. It was a self serving statement of a third party making the statements therein contained.

"3. It was highly incompetent, irrelevant and immaterial, and in its nature highly prejudicial to the defendant. Its admission was not necessary to clarify 76-A and it was not related to 76-B."

We think this assignment adequately met the applicable requirements of Rule 11. Clearly, it quoted the full substance of the evidence admitted and was definite enough to enable both court and opposing counsel readily to perceive the point intended to be relied on. *Seaboard Air Line Ry. Co.* v. *Watson,* 287 U. S. 86, 91.

Other assignments also seem sufficiently definite and formal to demand consideration. We do not pass upon the merits of any assignment and decide only that some, if not all, of them were improperly rejected.

The challenged judgment must be reversed. The cause will be remanded to the Circuit Court of Appeals for further proceedings in harmony with this opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.